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Voting-Equal Protection-Prisoners' Rights to Vote by Absentee Ballot or Special Procedures

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RECENT DEVELOPMENTS

Voting—Equal Protection—PRISONERS' RIGHTS TO VOTE BY ABSENTEE BALLOT OR SPECIAL PROCEDURES

O'Brien v. Skinner, 414 U.S. 524 (1974)

During 1973, the United States Supreme Court cautiously reconsidered the constitutionality of state election laws that deny absentee voting and registration privileges to persons who are confined in penal institutions but who are otherwise qualified to vote. The prevailing view, established in 1969 by *McDonald v. Board of Elections,*[1] had been that a state could deny unconvicted detainees absentee registration forms and ballots.[2] In the 1973 case of *Goosby v. Osser,*[3] however, the Court undermined that view by ordering the review of unconvicted detainees' constitutional claims which alleged not only exclusion from the state's absentee voting statute as in *McDonald,* but also that the state failed to provide them with any alternative means by which to vote.[4] Most recently, in *O'Brien v.*

[1] 394 U.S. 802 (1969).

[2] In *McDonald,* the Illinois absentee registration and balloting law (ILL. REV. STAT. ch. 46, §§ 19-1 to -3 (Supp. 1974)), which the state had construed to exclude unconvicted detainees, was held not violative of the equal protection clause. The *McDonald* Court, however, expressly distinguished the situation in which prisoners establish that they are absolutely precluded from voting: "[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on [prisoners'] ability to exercise the fundamental right to vote." 394 U.S. at 807. The Court further stated that the

> [a]ppellants agree that the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.

Id. at 808 n.6.

[3] 409 U.S. 512 (1973).

[4] In holding that the prisoners had presented a "substantial constitutional claim" for purposes of requiring a three-judge court to hear the case, the *Goosby* opinion distinguished *McDonald:*

> Petitioners' constitutional challenges to the Pennsylvania scheme are in sharp contrast. Petitioners allege that, unlike the appellants in *McDonald,* the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes "persons confined in a penal institution" from voting by absentee ballot, and because requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been denied. Thus, petitioners' complaint alleges a situation that *McDonald* itself suggested might make a different case.
>
> This is not to say, of course, that petitioners are as a matter of law entitled to the relief sought. We neither decide nor intimate any view upon the merits.

Id. at 521-22 (footnotes and citation omitted). *See generally* 52 B.U.L. REV. 641, 641-46 (1972).

Skinner,[5] the Court, adjudicating the constitutional question left unanswered by *Goosby*, held that New York's construction of its absentee voting statutes[6] to exclude unconvicted detainees and imprisoned misdemeanants, all of whom were otherwise qualified to vote, violated the equal protection clause of the fourteenth amendment.

The Supreme Court divided sharply on the rationale for its holding, however, suggesting a retreat from the past decade's broadened federal protection of voting[7] and prisoners' rights.[8]

I

FROM PRISON TO POLLING PLACE

On October 10, 1972, seventy-two prisoners at New York's Monroe County jail, including pretrial detainees and misdemeanants serving sentences, requested the County Commissioners of Elections to provide the necessary application forms for absentee registration and ballots for the November 7, 1972, general elections.[9] The Commissioners refused.[10] Previous requests to pro-

[5] 414 U.S. 524 (1974).

[6] The term "voting," as used here, refers to both registering to vote and casting a ballot in general elections. "Balloting" is assigned the narrow meaning of casting a ballot.

The New York absentee registration statute at the time of *O'Brien* permitted a qualified voter to register by absentee procedures only if he was confined at home, in a hospital, or in an institution "because of illness or physical disability," or if his "duties, occupation or business" required that he be outside the county of his residence on the days designated for personal registration. N.Y. ELECTION LAW § 153-a(1) (McKinney Supp. 1972). Absentee balloting was permitted if a qualified voter was confined in a veteran's hospital or away from his residence on vacation on election day. *Id.* §§ 117(1)(a), (c).

[7] The Warren Court plunged into the voting rights arena after removing the "political questions" bar to judicial review of legislative apportionment in Baker v. Carr, 369 U.S. 186 (1962). Since *Baker*, the Court has decided numerous voting rights cases and framed a patchwork of constitutional law on the right to vote. *See* notes 40-42 and accompanying text *infra*.

[8] Although the Warren Court vigorously protected the rights of the accused (*see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966)), increased judicial protection of prisoners' rights was left to the lower federal courts. *See, e.g.*, Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968). *See gencrally* Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669 (1966); Hollen, *Emerging Prisoners' Rights*, 33 OHIO ST. L.J. 1 (1972); Comment, *Prisoners' Rights and Equal Protection*, 29 AM. U.L. REV. 482 (1971); *Symposium—Prisoners' Rights and the Correctional Scheme: The Legal Controversy and Problems of Implementation*, 16 VILL. L. REV. 1029 (1971).

[9] The League of Women Voters represented the prisoners in requesting statutory application forms. Brief for Appellants at 5-6, O'Brien v. Skinner, 414 U.S. 524 (1974) [hereinafter cited as Brief for Appellants]. After the Commissioners' refusal, the Leagne, with assistance from the county sheriff, distributed forms to the jail's population on which the prisoners stated their names, residences, and desire to vote. *Id.* Some of the prisoners were already registered and sought only a means for balloting.

[10] The Commissioners based their refusal on a construction of the New York absentee

vide mobile registration and balloting units in the jail or to transport the prisoners to appropriate registration facilities had also been denied.[11] The prisoners then petitioned for judicial review of these administrative decisions in the state court.[12]

Both the New York Supreme Court and Appellate Division construed the absentee voting provisions as allowing petitioners to register and vote by absentee means because they were under a "physical disability" and therefore unable to appear personally.[13]

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registration and balloting provisions that excluded unconvicted detainees and imprisoned misdemeanants. Brief for Appellants at 5.

[11] The officials maintained that they had no specific duty to register the petitioners by either of these alternative means, both of which allegedly involved "unreasonable" burdens. Memorandum of Law for Respondent at 3, O'Brien v. Skinner, 40 App. Div. 2d 942, 337 N.Y.S.2d 700 (4th Dep't 1972).

[12] Petitioners brought a summary proceeding in the Supreme Court under N.Y. Civ. PRAC. LAW § 7801 (McKinney 1963), and N.Y. ELECTION LAW § 331 (McKinney 1964). Section 7801 of the New York Civil Practice Law and Rules permits a special proceeding against an administrative agency or officer in the nature of a writ of mandamus. Section 331 of the New York Election Law permits a qualified voter who has been unlawfully denied registration or application to vote to seek judicial compulsion of his registration or reception of his vote.

In their petition and supporting affidavit, the plaintiffs alleged that they were residents of Monroe County and were qualified voters. The Commissioners, however, charged that under New York law they reserved the right to disqualify some of the prisoners because of prior felony convictions. Brief for Appellants at 7; *see* N.Y. ELECTION LAW § 152(2) (McKinney Supp. 1972). *See also* Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968) (upholding constitutionality of New York statute disenfranchising convicted felons).

[13] The New York Supreme Court, Special Term, granted relief to those prisoners who had registered prior to confinement but dismissed the petition of those prisoners who had not so registered. Appellants' Jurisdictional Statement at 21. O'Brien v. Skinner, 414 U.S. 524 (1974) [hereinafter cited as Appellants' Jurisdictional Statement]. The trial judge concluded that the prisoners were entitled to register and cast their ballots in absentia, stating that

> [s]ince Election Law, § 330 requires [absentee voting] provisions to he construed liberally, and because an inmate of a jail is under physical disability to present himself at a polling place or at the central registration office, this court concludes that petitioners are entitled to absentee registration upon complying with the requirements of Election Law § 153-a, provided that they are not disenfranchised by the provisions of Election Law, § 152 [disqualifying felons] and provided that they make due and timely application for such registration.

Id. at 19-20. He also found, however, that the unregistered prisoners had not supplied the required information before the absentee registration deadline. The justice criticized these prisoners for not using the absentee application forms provided by the Board of Elections. *Id.* at 20. The court apparently failed to realize, however, that the Board had refused to make these forms available to the prisoners. *See* text accompanying notes 9-10 *supra.*

Because Special Term dismissed the petition without prejudice to proper and timely application for absentee ballots by the registered prisoners, the effect of its decision was to allow absentee voting for those prisoners who had registered prior to confinement while denying the voting right to those who had not previously registered.

The Appellate Division concluded that *all* the prisoners came within the statutory provisions:

Section 117-a of the Election Law provides for absentee voting where a qualified

However, the New York Court of Appeals, in a five to two decision, reversed, and dismissed the petition. The majority summarily rejected all alternative proposals for "in person" voting[14] and construed the election law to exclude prisoners from absentee registration and balloting privileges.[15] The court held that such a statutory construction did not deprive the prisoners of equal protection of the laws under the fourteenth amendment.[16] Within four days of the 1972 general elections Justice Thurgood Marshall, sitting as Circuit Justice, denied the petitioners' application for a stay of the Court of Appeals' judgment.[17]

The Supreme Court heard the prisoners' appeal one year later. Seven Justices concluded that the prisoners had been denied equal protection of the law. Only three of the Justices voting to

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voter may be unable to appear because of a physical disability. We believe that petitioners being so confined, are physically disabled from voting and should be permitted to do so by casting absentee ballots.

O'Brien v. Skinner, 40 App. Div. 2d 942, 337 N.Y.S.2d 700, 701 (4th Dep't 1972). Accordingly, the intermediate court modified the lower court's judgment by ordering that the Commissioners register the prisoners who were not registered but who were otherwise qualified to vote and thereupon issue them absentee ballots. *Id.* Having found that the prisoners had indicated their eligibility to register and to vote and their desire to do so by absentee means within the lawful period, the Appellate Division rejected Special Term's distinction between the application form described in the Election Law (§§ 153-a(4), 117-a(6) (McKinney 1964)), and the request forms provided by the League of Women Voters.

[14] The majority stated:

We reject out of hand any scheme which would commit respondents to a policy of transporting such detainees to public polling places; would assign them the responsibility of providing special voting facilities under such conditions, and in view of the attendant difficulties; or, would threaten like hazards embraced by such schema.

O'Brien v. Skinner, 31 N.Y.2d 317, 319, 291 N.E.2d 134, 135, 338 N.Y.S.2d 890, 892 (1972).

[15] Relying on the fact that an applicant for absentee voting was required to submit a medical "certificate made by a duly licensed physician or by the medical superintendent or administrative head of a hospital or institution," (N.Y. ELECTION LAW §§ 117-a(5), 153-a(5) (McKinney 1964)), the majority concluded that the statutes included only persons "medically disabled by reason of some malady or other physical impairment," and that "the fact of confinement to a penal institution would not entitle a voter or registrant to avail himself of the absentee provisions." 31 N.Y.2d at 319, 291 N.E.2d at 136, 338 N.Y.S.2d at 892.

[16] 31 N.Y.2d at 319, 291 N.E.2d at 136, 338 N.Y.S.2d at 892. The dissenting judges would have affirmed the lower court's ruling that the absentee voting provisions of the election law include all otherwise qualified prisoners. *Id.* at 321, 291 N.E.2d at 137, 337 N.Y.S.2d at 894 (Fuld. C.J. & Burke, J. dissenting). Judge Burke commented that any construction of the election law that precluded petitioners from voting would deny them equal protection. *Id.*

[17] O'Brien v. Skinner, 409 U.S. 1240 (1972). Justice Marshall commented favorably on the merits of the petitioners' claim but refused to order a stay because of "compelling practical considerations," *e.g.*, the inability of state election officials to process registration statements in the short time remaining before the election, petitioners' delay in seeking absentee ballots, and a lack of information on the state courts' disposition of the case. *Id.* at 1241-42.

reverse based their decision on New York's unjustified denial of the unconvicted detainees' and imprisoned misdemeanants' fundamental right to vote.[18] Chief Justice Burger, speaking for the Court, based reversal on a less sweeping rationale. His opinion held only that allowing unconvicted detainees and imprisoned misdemeanants who were confined *outside* the county of their residence to vote, while denying the vote to appellants who were confined *within* the county of their residence, was an arbitrary, unconstitutional discrimination.[19] The dissenting Justices, on the other hand, concluded that this inequity was not of sufficient magnitude to be considered a constitutional deprivation.[20]

II

CONSTITUTIONAL PROTECTION OF PRISONERS' RIGHTS TO EQUAL TREATMENT IN THE VOTING PROCESS

A. *Where the Court Stands After O'Brien v. Skinner*

The sharp split of opinion in *O'Brien* underscores a subtle shift in the Supreme Court's stance on judicial review of state action regulating voting. During the past decade the Court has applied one of two standards in reviewing equal protection challenges to state action.[21] If the claimant establishes an infringement of a "fundamental right"[22] or discrimination based on a "suspect classification,"[23] the state must demonstrate a "compelling interest" to justify its discriminatory action. Absent such an initial showing by the claimant, he has the more difficult burden of proving that the state action has no rational relation to any permissible state objective.[24] The Burger Court's handling of recent voting rights cases, however, demonstrates a gradual movement away from this compelling state interest-rational relation dichotomy in the voting rights area.

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[18] 414 U.S. at 531 (Marshall, J., concurring). Justices Brennan and Douglas concurred in this opinion. *See* notes 31-32 and accompanying text *infra*.

[19] 414 U.S. at 530. Justices Powell, Stewart, and White concurred in Chief Justice Burger's opinion. *See* notes 33-35 and accompanying text *infra*.

[20] 414 U.S. at 536 (Blackmun, J., dissenting). Justice Rehnquist joined in this opinion. *See* notes 47, 71-73 and accompanying text *infra*.

[21] *See generally* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 16-44 (1973).

[22] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (equal right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (procreation).

[23] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (wealth); Strauder v. West Virginia, 103 U.S. 303 (1880) (race).

[24] *See, e.g.*, McDonald v. Board of Elections, 394 U.S. 802 (1969).

In *Dunn v. Blumstein*[25] and in dicta in *San Antonio Independent School District v. Rodriguez*,[26] the present Court indicated that the compelling state interest standard of review would apply when the fundamental equal right to vote had been denied. Chief Justice Burger dissented in *Dunn*, however, and condemned the compelling state interest standard as too rigorous.[27] Soon thereafter in *Rosario v. Rockefeller*,[28] a divided Court circumvented the compelling state interest precedents and upheld a section of the New York election law that limited voter eligibility for party primaries. Justice Stewart, writing for the majority, distinguished *Dunn* and expressly limited application of the compelling state interest standard to cases in which "the State totally denied the electoral franchise to a particular class of residents."[29]

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[25] 405 U.S. 330 (1972). In a six to one decision, the majority applied the compelling state interest standard and held that Tennessee's durational residency requirement was an unconstitutional infringement of the fundamental rights of voting and interstate travel.

[26] 411 U.S. 1 (1973). Although the Court rejected the claim that the Texas funding scheme for primary and secondary education violated the equal protection clause, both Justice Powell's majority opinion (*id.* at 34 n.74) and Justice Marshall's dissent (*id.* at 101) emphasized that the fourteenth amendment encompassed a fundamental right to vote on an "equal basis with other citizens." *See* note 42 *infra*.

[27] Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

405 U.S. 330, 363-64 (1972); *cf. id.* at 360 (Blackmun, J., concurring) (compelling state interest standard questionable).

[28] 410 U.S. 752 (1973). The challenged statute required voters to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the next party primary.

[29] *Id.* at 757. Instead of reiterating the rational relation test, however, Justice Stewart questioned whether the enrollment cut-off date was "an arbitrary time limit unconnected to any important state goal." *Id.* at 760. The majority concluded that the time period was not arbitrary and that it had been legitimately adopted by the state to hinder party raiding. Justices Marshall, Douglas, and Brennan joined in a dissent written by Justice Powell, who had written the *Rodriguez* opinion handed down the same day. Powell criticized the majority for ignoring the precedents and abandoning the compelling state interest standard:

> The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal"; . . . The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant burdens on the right to vote and to associate freely with the party of one's choice.

Id. at 767.

The Court temporarily revived the compelling state interest standard in nullifying an Illinois election law that prohibited a person from voting in the primary of one party if he had voted in the primary of any other party within the preceding 23 months. Kusper v. Pontikes, 414 U.S. 51, 61 (1973). The holding rests solely, however, on the statute's infringement of the right of free political association with the party of one's choice protected

In *O'Brien* the unconvicted detainees and confined misdemeanants established that New York had totally precluded their class from voting. Only the concurring Justices, however, followed *Dunn* as limited by *Rosario* and applied the compelling state interest standard.[30] Chief Justice Burger, writing for the Court, abandoned the compelling state interest-rational relation dichotomy and employed a more flexible, but undefined, standard of review. Although he never directly addressed the question of the proper standard of review, he characterized the statutory construction of the New York absentee voting provision as "wholly arbitrary" and "an unconstitutionally onerous burden on the . . . exercise of the franchise."[31] It is also clear that the dissent rejected the application of the compelling state interest standard.[32] Consequently, even though the Chief Justice was writing for only four members of the Court, it is apparent that *O'Brien* represents a significant retrenchment in the voting rights area.

The retreat from application of the compelling state interest standard in voting rights cases increases the possibilities for judicial flexibility and restraint in future cases. It also allows the Court to retreat from the sweeping rationale of existing precedents in the voting rights area[33] and to reach some incongruous results.[34] Until the parameters of the Court's position are outlined, however, the results of future equal protection challenges to electoral regulations may be less predictable than they were with the more precise tests already developed under the compelling state interest standard.[35]

by the first and fourteenth amendments. Although the Court cited Dunn v. Blumstein, 405 U.S. 330 (1972), the fundamental "equal right to vote" was never mentioned.

[30] Citing Dunn v. Blumstein, 405 U.S. 330 (1972), Justice Marshall applied the compelling state interest standard of review in *O'Brien*. He found the analogy between the absolute preclusion of the prisoners' rights to vote and express statutory disqualifications sufficient to justify such review:

> Denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these appellants.
>
> It is well settled that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." It is this standard of review which must be employed here.

414 U.S. at 533 (citations omitted).

[31] *Id.* at 530 *quoting* Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

[32] *See* note 94 *infra*.

[33] Chief Justice Burger's opinion in *O'Brien* ignored all prior voting rights cases except *Rosario v. Rockefeller*. He cited *McDonald* and *Goosby* only for the purpose of distinguishing *McDonald*. *See* text accompanying notes 1-6 *supra*.

[34] *Cf.* Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (Blackmun, J., dissenting). The dissenting Justices concluded that the requirements for eligibility to vote in party primaries in *Kusper* and *Rosario* could not be distinguished. In their view, the result turned only on application of different standards of review.

[35] *See* Rosario v. Rockefeller, 410 U.S. 752, 767 (1973) (Powell J., dissenting); notes 83-84 and accompanying text *infra*.

B. *Underlying Equal Protection Issues*

Future litigants challenging or defending election laws under the equal protection clause should realize that resolution of their cases will depend on more than rigid application of court-made rules governing the standard of review. The success of their equal protection attacks may depend on how the following key issues are framed and analyzed: (*1*) What are the nature and sources of the alleged right denied? (*2*) What class or category of persons is precluded from exercising the alleged right? (*3*) Precisely how has the state acted to deny or infringe exercise of the right? and (*4*) What objectives support the state's discriminatory action?[36]

1. *Constitutional Underpinning of the Right To Vote*

The Constitution does not expressly guarantee citizens the right to vote. Several clauses and amendments do, however, establish various electoral requirements.[37] Prior to 1962, federal elections were distinguished from state and local elections. The Supreme Court, although recognizing state authority to set voter qualifications, had extended federal constitutional protection to the right to vote for federal officers.[38] The Court at the same time

[36] *Cf.* Dunn v. Blumstein, 405 U.S. 330, 335 (1972). Justice Marshall stated:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

Id.

[37] U.S. CONST. art. I, § 2, cl. I (popular election of Representatives by electors must satisfy qualifications set by states); *id.* art. I, § 4 (congressional control over time, manner, and places for holding elections for Senators and Representatives); *id.* art II, § 1, cls. 1-3 (electoral college device for election of President and Vice-President); *id.* amend. XII (presidential electors); *id.* amend. XIV, § 2 (apportionment of House of Representatives); *id.* amend. XV (race improper criterion for voter qualification); *id.* amend. XVII (direct election of Senators by electors satisfying qualifications set by states); *id.* amend. XIX (sex improper criterion for voter qualification); *id.* amend. XXIII (presidential electors for District of Columbia); *id.* amend. XXIV (poll tax prohibited); *id.* amend. XXVI (prohibition of age qualifications for citizens eighteen years of age or older).

[38] In a landmark case, *Ex parte* Yarborough, 110 U.S. 651 (1884), the Court held that the right to vote for a candidate for the House of Representatives was secured by Article I, § 2 of the Constitution. In United States v. Classic, 313 U.S. 299 (1941), the Court defined the voting rights of "qualified voters" in federal elections as follows:

> The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art.

adhered to the position that "the right to vote for the election of state officers . . . is a right or privilege of state citizenship, not of national citizenship."[39] However, after entering the arena of legislative apportionment in *Baker v. Carr*,[40] the Court gradually expanded protection of the right to vote in all federal, state, and local elections under the equal protection clause of the fourteenth amendment.[41] Although no case has expressly held that an individual's right to vote in a state election is a fundamental right for purposes of the equal protection clause,[42] state voter

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I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Id. at 314-15 (citations omitted). Thus, in federal elections state regulation is limited to setting qualifications for voting, and the scope of that authority may be restricted by congressional action under Article I, § 4 and the necessary and proper clause. *Cf.* Oregon v. Mitchell, 400 U.S. 112 (1970); Lassiter v. Northampton Bd. of Elections, 360 U.S. 45, 51 (1959). *But see* Oregon v. Mitchell, 400 U.S. 112, 154-213 (1970) (Harlan, J., dissenting) (voting a privilege of state citizenship). *See generally* Denno, *Politics, the Constitution and the Eighteen-Year-Old Vote*, 35 ALBANY L. REV. 1, 6-14 (1970); Kirby, *The Constitutional Right To Vote*, 45 N.Y.U.L. REV. 995, 1003-06 (1970).

[39] Snowden v. Hughes, 321 U.S. 1, 7 (1944) (citation omitted).

Forty years earlier, the Court had declared that

the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.

Pope v. Williams, 193 U.S. 621, 632-33 (1904); *cf.* Oregon v. Mitchell, 400 U.S. 112 (1970).

[40] 369 U.S. 186 (1962). In *Baker*, the Court merely removed the "political question" obstacle to judicial review of state apportionment systems which discriminated against persons living in more populous election districts. *See generally* Note, *Judicial Intervention in National Political Conventions: An Idea Whose Time Has Come*, 59 CORNELL L. REV. 107, 111-12 (1973).

[41] Reynolds v. Sims, 377 U.S. 533 (1964), established the "one man, one vote" concept as a principle of constitutional law by requiring apportionment of seats in both houses of state legislatures on the basis of population. Later cases extended this principle to local elections. *See* Hadley v. Junior College Dist., 397 U.S. 50 (1970) (junior college district election of trustee); Avery v. Midland County, 390 U.S. 474 (1968) (county election).

The Court gave wide constitutional protection to the right to vote in *Reynolds* and initiated the movement toward full recognition of voting as a fundamental interest: "Undeniably the Constitution of the United States protects the right of all *qualified citizens* to vote, in state as well as in federal elections." 377 U.S. at 554 (emphasis added). The Court continued:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. at 561-62.

[42] *But see* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (dictum that voting too fundamental to be burdened by poll tax).

In San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Powell stated that the key to determining whether an asserted constitutional right is "fundamental" and

qualifications denying an identifiable class of persons equal treatment in the electoral process have been overturned.[43] The Court's

thereby requires a compelling state interest to justify its infringement is whether or not the right is "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34. In concluding that the right to equality in public education is not fundamental, Justice Powell noted that

> *Dunn* fully canvasses this Court's voting rights cases and explains that "this Court has made clear that a citizen has a *constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction." The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the court noted in *Harper v. Virginia Bd. of Elections,* "the right to vote in state elections is nowhere expressly mentioned."

Id. at 34 n.74 (citations omitted).

Justice Marshall, dissenting in *Rodriguez,* agreed that "whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee." *Id.* at 101. Justice Marshall, however, formulated a different test for determining what is a "fundamental interest," namely whether the right has unique status and value in American society. He thus tied the right to vote in state elections directly to "basic civil and political rights inherent in the First Amendment." *Id.* at 88-90.

[43] Traditionally, the states have had wide latitude in fixing voter qualifications for all elections. Justice Black summarized the constitutional authority of the states to set voter qualifications:

> It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves.

Oregon v. Mitchell, 400 U.S. 112, 125-26 (1970). Moreover, Justice Douglas, writing for the Court in 1959, stated:

> We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show.

Lassiter v. Northampton Bd. of Elections, 360 U.S. 45, 51 (1959).

But two years after *Reynolds,* Justice Douglas wrote the opinion holding a state-imposed poll tax violative of the equal protection clause of the fourteenth amendement and noted:

> [W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966). The equal protection clause has also been held to invalidate state elections laws delineating certain residency or status requirements. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (holding unconstitutional statute requiring one year of residency in state and three months in county before qualifying to vote); Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (holding unconstitutional statute limiting right to vote on revenue bond issues to property owners); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (holding unconstitutional statute requiring electors in school board election to be parents or property owners); Carrington v. Rash, 380 U.S. 89 (1965) (holding unconstitutional statute excluding armed services personnel from voting elsewhere than in pre-military county of residence). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (property qualification valid in special purpose district), *noted in* 59 CORNELL L. REV. 687 (1974). *See also* Katzenbach v. Morgan, 384 U.S. 641 (1966) (federal voting rights act upheld, impliedly invalidating state literacy tests); Guinn v.

position on state electoral regulation that merely interferes with individual voting rights remains to be articulated.

The prisoners in *O'Brien* claimed more than mere interference with their voting rights. They established that New York, by its judicial construction of the absentee voting law and by the denial of any alternative means by which to vote, had absolutely precluded unconvicted detainees and imprisoned misdemeanants from voting.[44] The state did not disqualify these detainees and misdemeanants as voters; instead, it barred them from exercising the franchise. The distinction rests on the permanence of the disability. While a disqualification is unlimited in time, a bar is temporary. For example, a statute disqualifying all convicted felons from voting operates indefinitely on the individual felon's voting rights. The voting bar in *O'Brien,* on the other hand, focused on one point in time: the prisoners were precluded from voting in a specific election occurring during the period of their incarceration. Although total disqualification from voting may be the more serious limitation on the rights of a class, loss of the right to vote in one election is not an insignificant deprivation.[45]

The split of opinion in *O'Brien* offers little hope for clear articulation of the constitutional status of the right to vote. The opinion of the Court emphasized class discrimination as the constitutional violation while failing to elucidate the precise legal right denied.[46] The dissenting Justices focused on the nature of the state action challenged and implied that "minor" deprivations of the right to vote, even if without justification, are not violative of the Constitution.[47] Only the three concurring Justices expressly stated

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United States, 238 U.S. 347 (1915) (discriminatory grandfather clause in state election law violates fifteenth amendment).

The scope of the equal protection limitation on state voter qualifications since the reapportionment cases has led one commentator to conclude that "[a]side from citizenship, age and minimum residency requirements . . . little else seems compelling. Hence, literacy tests and denying the vote to convicted felons seem likely to fall." Kirby, *supra* note 38, at 1013. *But see* Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (disqualification of felons held constitutional).

[44] *See* Brief for Appellants at 14-16; notes 9-16 and accompanying text *supra.*

[45] Denial of the right to vote in *any* election, whether federal, state, or local, is a serious deprivation because elections occur only at substantial time intervals. For example, ballots for President, Governor of New York, or Mayor of the City of New York are cast only once every four years; for each United States Senator, only once every six years.

[46] *See* notes 55, 60 & 61 and accompanying text *infra.*

[47] Furthermore, this fallout from the New York statutes is minor and collateral and not of great, let alone constitutional import. There is bound to be a dividing line somewhere, intended or unintended (as I suspect this was). If that dividing line operates to deprive a person of what he feels is his right to vote, his reaction will be critical. Whether he has a constitutional claim, however, is something else again. 414 U.S. at 536 (Blackmun, J., dissenting).

that when, without sufficient reason, a state prevents a class of competent voters from exercising the right to vote, it violates the Federal Constitution.[48] From these opinions one may conclude that the Constitution implicitly provides an elusive right of a group to "equal treatment in the voting process,"[49] but that ironically an individual's right to vote in a *specific* election, a right which is often assumed to exist,[50] is not protected by the Constitution.

This irregularity undoubtedly results from the expanding case-by-case protection of the right to vote—not expressly mentioned in the Constitution—through the equal protection clause.[51] The Supreme Court's reluctance to establish an individual's constitutionally protected right to vote may be rationalized on the

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[48] [I]t can no longer be contended that this case involves "merely a claimed right to absentee ballots" and "not the right to vote," or that the challenged statutes "have no direct impact on [appellants'] right to vote" . . . . [S]uch statements, in the context of this case, fly in the face of reality. Nor can it be contended that denial of absentee ballots to appellants does not deprive them of their right to vote any more than it deprives others who may "similarly" find it "impracticable" to get to the polls on election day . . . . [H]ere, it is the State which is both physically preventing appellants from going to the polls and denying them alternative means of casting their ballots. Denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these appellants.

Id. at 532-33 (Marshall, J., concurring).

Justice Marshall was responding to the conclusions of the New York Court of Appeals and the brief of the State Attorney General. The New York Court of Appeals had stated:

> The underlying right which is the subject of these proceedings is not the right to vote, that right is independently guaranteed, but merely a claimed right to absentee ballots, and, in some instances, absentee registration. And since [the absentee] provisions have no direct impact on petitioners' right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained.

31 N.Y.2d at 320, 291 N.E.2d at 136, 338 N.Y.S.2d at 893 (citations and footnotes omitted). In light of the fact that the prisoners were not allowed to vote, the court's reasoning is hard to understand. On appeal, the appellants described the inconsistency as leaving them "with a 'right' that they cannot exercise and in no different position than if that 'right' had been denied." Brief for Appellants at 15 n.11; *see* Note, *Election Laws as Legal Roadblocks to Voting*, 55 IOWA L. REV. 616, 650 (1970).

The attorney general argued that *O'Brien* was distinguishable from *Goosby* because the absentee voting statute in *Goosby* expressly excluded "persons confined in a penal institution." Brief for Attorney General of New York as Amicus Curiae at 10, O'Brien v. Skinner, 414 U.S. 524 (1974) [hereinafter cited as Brief for Attorney General]. Thus, although the plight of the *Goosby* prisoners was analogous to that of disenfranchised convicted felons, he considered the judicial instruction which exluded the prisoners in *O'Brien* distinguishable.

The prisoners in both *O'Brien* and *Goosby*, however, were absolutely precluded from voting in at least one election by state action, although neither group was indefinitely disqualified. The distinction noted by the Attorney General goes to the nature of the state action, not the right denied. The New York absentee provisions, as construed by the New York Court of Appeals and implemented by the state, are equivalent in effect to the express statutory exclusion in *Goosby*.

[49] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973).

[50] *See* R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES 370 (1967).

[51] *See* notes 39-41 and accompanying text *supra*.

grounds of limiting "substantive" equal protection[52] or of judicial conservatism in an area historically reserved to state legislatures.[53] Nonetheless *O'Brien* highlights the need for reconsideration of the constitutional underpinnings of the right to vote in contemporary American democracy.[54]

2. *Identification of the Class Subject to Discriminatory State Action*

A fundamental principle of equal protection adjudication requires "definitive description of the classifying facts or delineation of the disfavored class."[55] Classifications which are based on

[52] However, the Burger Court's willingness to resurrect substantive due process by reading a personal right of privacy into the fourteenth amendment (*see, e.g.,* Roe v. Wade, 410 U.S. 113, 167-71 (1973) (Stewart, J., concurring) (state abortion statute violates due process)) conflicts with such a justification.

[53] The Court might be concerned about inviting increased constitutional litigation in the area of voting rights which affects millions of persons who are potential plaintiffs. Proper separation of the judicial function from the legislative function is also a legitimate concern for the Court, especially when it is faced with reviewing the detailed schemes of state election laws. The Court might consider itself insufficiently familiar with the local needs and complexities for which the particular legislation was adopted. It is questionable, however, whether any of these concerns outweigh the Supreme Court's unique capacity to guarantee individual civil rights. *See* note 83 *infra.*

[54] Several Justices have suggested that the right to vote is implicit in the first amendment, but the proposition has never been directly adopted by a majority of the Court. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23, 38-40 (1968) (Douglas, J., concurring); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 88-90 (1973) (Marshall, J., dissenting). Beginning with the famous dictum that the right to vote is a "fundamental political right, because preservative of all rights" (Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)), voting has been characterized as both personal and political expression. This conclusion rests on two propositions. First, in a democratic society each individual has an inalienable right to make political choices and to express those choices by use of the ballot. *See* Kirby, *supra* note 38, at 1003-13. Second, voting is not an isolated individual undertaking; it becomes meaningful only as a group activity. Because voting is political in nature, a spectrum of associational rights is attached to an individual's political choices expressed by balloting. *See* Fortson v. Morris, 385 U.S. 231 (1966) (Fortas, J., dissenting).

Thus, the Supreme Court faces the task of securing majority rule while simultaneously protecting the rights of minority groups. *Compare* Reynolds v. Sims, 377 U.S. 533 (1964) (one-man, one-vote principle adopted), *with* Bullock v. Carter, 405 U.S. 134 (1972) (poor voters supporting particular candidate denied equal protection); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969) (exclusion of certain nonproperty holders from school board elections held unconstitutional); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (petition requirements for third party candidates overly burdensome); Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) (disenfranchised Puerto Rican community needs protection); Carrington v. Rash, 380 U.S. 89 (1965) (exclusion of members of armed services from elections held unconstitutional). *See also* Williams v. Rhodes, 393 U.S. 23, 38-40 (1968) (Douglas, J., concurring). *See generally* Note, *The Emerging Right to Candidacy in State and Local Elections: Constitutional Protection of the Voter, the Candidate, and the Political Group,* 17 WAYNE L. REV. 1543, 1555-56 (1971); 20 CASE W. RES. L. REV. 892, 904-05 (1969).

[55] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 19 (1973). *Compare* Justice Stewart's formulation of "discrete and objectively identifiable classes" (*id.* at 60), *with* Justice

race,[56] alienage,[57] illegitimacy,[58] and sometimes wealth[59] require close judicial scrutiny.

The common factor uniting all of the appellants in *O'Brien* was their imprisonment. Additionally, three distinct subcategories existed—those awaiting trial, those serving sentences as misdemeanants,[60] and those confined in the county of their residence.[61] The Chief Justice considered only the discrimination against the last of these subcategories. He found New York's apparent distinction between qualified voters confined within the county of their residence and those confined outside the county of their residence sufficiently arbitrary to dispose of the case on this ground alone.[62] But the conclusion that New York allows persons confined in prison outside the county of their residence to vote by absentee means rests upon a tenuous statutory construction.[63] No New York cases support this construction, but the Court accepted it when counsel for Monroe County unwittingly conceded such a construction at oral argument.[64]

Thus the narrow ratio decidendi of the four-member plurality is significant in three respects: (*1*) the precise precedential impact of the holding is very limited; (*2*) narrow, tenuous distinctions between even hypothetical categories may be persuasive; and (*3*) this rationale allowed the Court to avoid the issue of discrimination based upon wealth.

The *O'Brien* appellants had raised the issue of discrimination based on wealth, contending that New York "erect[ed] an arbitrary financial obstacle" to voting because detainees who were financially unable to afford bail were prevented from voting in person or by absentee ballot.[65] Assuming that the offenses with which uncon-

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Marshall's view that "precise identification of the particular individuals who compose the disadvantaged class" is not required. *Id.* at 93. *See also* Bullock v. Carter, 405 U.S. 134, 144 (1972); Reynolds v. Sims, 377 U.S. 533 (1964).

[56] Strauder v. West Virginia, 100 U.S. 303 (1880).

[57] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[58] Levy v. Louisiana, 391 U.S. 68 (1968).

[59] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[60] *See* Brief for Appellants at 25-26; Brief for Attorney General at 13.

[61] The fact that all the appellants were Monroe County residents was never formally proven, but was alleged in their verified complaint at trial and suhsequently admitted. Brief for Appellants at 7.

[62] 414 U.S. at 530.

[63] Supposedly a prisoner confined outside the county of his residence is "unavoidably absent from the county of his residence . . . because his duties, occupation or business require him to be elsewhere on the day of election" within the scope of N.Y. ELECTION LAW §§ 117(1)(b), 153(1) (McKinney Supp. 1973).

[64] 414 U.S. at 529 n.3.

[65] Brief for Appellants at 25. As a matter of strategy, the appellants' counsel's decision

victed detainees were charged were bailable offenses,[66] these detainees, if they were not financially disabled, would have had an opportunity to vote equal to that of persons indicted and released on bail. In essence, their contention was that the imposition of monetary bail burdened their right to vote within the rationale of *Harper v. Virginia Board of Elections*[67] and *Bullock v. Carter.*[68]

The unconvicted detainees' claim could be met by at least two arguments. First, the financial burdens in *Harper* (poll tax) and in *Bullock* (candidate filing fees) were integral parts of the states' election law schemes.[69] These wealth distinctions restricted the electoral capacity of the poor as a class. In *O'Brien,* however, the financial burden was a result of the criminal justice system as a whole and was only incidentally related to voting.[70] Moreover, state-imposed bail is limited only by the eighth amendment's requirement that bail not be excessive.[71] Second, the *McDonald* case is authority for the proposition that an absentee voting law like New York's does not create a discriminatory wealth classification.[72]

The New York provisions as construed and applied by the New York courts classified the appellants, both unconvicted detainees and imprisoned misdemeanants, primarily on the basis of their confinement in a penal institution.[73] In the case of convicted misdemeanants, the record offered no indication of discrimination

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to distinguish unconvicted detainees created a risk for the convicted misdemeanants because it provided a basis for reversal as to unconvicted detainees alone.

[66] The record gives no indication of the specific offenses with which the *O'Brien* detainees were charged.

[67] 383 U.S. 663 (1966).

[68] 405 U.S. 134 (1972).

[69] In *Bullock*, "poor voters" were allowed to vote, but the meaningfulness of their choice was diluted because "poor candidates" for whom they supposedly desired to vote were financially unable to gain access to the ballot. *Id.* at 144. Likewise the $1.50 poll tax invalidated as a voter qualification in *Harper* did not absolutely bar anyone from voting but merely placed an unreasonable financial burden upon exercise of the franchise. 383 U.S. at 668-70.

[70] *See* 52 B.U.L. REV. 641, 644-47 (1972).

[71] U.S. CONST. amend. VIII. The Court has taken several steps to limit wealth discrimination among criminal defendants. In Griffin v. Illinois, 351 U.S. 12 (1956), the Court held that the equal protection clause precluded the states from requiring indigent criminal defendants to pay for an appellate transcript when such a requirement effectively deprived defendants of their right to an appeal granted by the state. Likewise, in Douglas v. California, 372 U.S. 353 (1963), the Court, applying the same rationale, established an indigent's right to court-appointed counsel on direct appeal. *See also* Tate v. Short, 401 U.S. 395 (1971) (equal protection requires that statutory ceiling on imprisonment for any offense be same irrespective of defendant's economic status). This rationale has not been extended to bail determinations.

[72] 394 U.S. at 807-09 (1969) (absentee voting statute excluding prisoners does not discriminate on basis of wealth).

[73] 31 N.Y.2d at 319, 291 N.E.2d at 136, 338 N.Y.S.2d at 892.

on the basis of wealth.[74] For unconvicted detainees unable to post bail, the disability resulting from their poverty was only incidental to their challenge to the absentee voting laws.[75] Consequently, even though the Court did not reach the issue of wealth discrimination, it is doubtful that appellants' claim would have succeeded.

3. *Identification of the State Action Subject to Judicial Review*

The precise question on appeal in *O'Brien v. Skinner* was whether the New York absentee voting statutes, as construed and applied by the New York courts to exclude unconvicted detainees and imprisoned misdemeanants from voting, violated the equal protection clause of the fourteenth amendment.[76] In distinguishing *McDonald,* the appellants did state that they were in fact denied all available means of voting.[77] In framing the precise question appealed, however, they failed to emphasize that the state legislature and state courts, as well as the local administrators, had combined to preclude them from voting. Understandably, therefore, the Court's opinion merely adopted the appellants' reference to the unconstitutionality of the *judicial construction* of the absentee voting statutes.[78] Implicit in the holding, however, is that the entire state action involved, including the administrative denial of alternative voting procedures, was unconstitutional.

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[74] It is conceivable, however, that a correlation could be established between persons imprisoned for misdemeanors and their relative poverty. *See* H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 147-53 (3d ed. 1959). This fact alone, however, would probably not adequately define a class for purposes of equal protection analysis. *See* note 66 and accompanying text *supra.*

[75] It is possible that an unconvicted detainee, able to provide bail and confined in prison, but unable to vote because he chose not to post bail, would have the same equal protection claim as a detainee financially unable to post bail—*i.e.,* that his right to vote was denied because of his penal status, rather than his financial status.

[76] In reviewing the constitutionality of a state statute, the *construction* of the statute adopted by the state's highest court is generally conclusive in the United States Supreme Court. *See* Baggett v. Bullitt, 377 U.S. 360, 369 (1964). Furthermore, the statute is tested in light of its present purpose and effect. *See* McGowan v. Maryland, 366 U.S. 420 (1961); Lane v. Wilson, 307 U.S. 268 (1939). *See also* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 83-87 (1969).

The appellants also asserted that preclusion from voting because of state-imposed confinement violates the due process guarantees of the fourteenth amendment. Brief for Appellants at 2. This issue was not litigated in the state courts and received no attention in the Supreme Court.

[77] Brief for Appellants at 14.

[78] 414 U.S. at 530-31. Close analysis of the facts and rationale reveal, however, that the Court held the statutes unconstitutional as construed *and applied* to these appellants.

The concurring Justices were more specific: "[I]t is the State which is both physically preventing appellants from going to the polls *and denying them alternative means of casting their ballots.*" *Id.* at 533 (emphasis added).

The dissenting Justices, persuaded by the New York Attorney General's explanation of the concept of "remedial legislation," failed to perceive the scope and nature of the state action under review.[79] In his brief as amicus curiae, the Attorney General merely analyzed the statutes on their face without considering the administrative and judicial denials of alternative means of voting.[80] He contended that because the statutes on their face were remedial in nature, close judicial scrutiny was inappropriate. This argument relies on a policy of judicial deference to legislation enacted to remove existing inequities. New York's absentee voting laws were designed to extend the capacity to vote to those who were previously unable to exercise that right. Therefore, the Attorney General argued, the judiciary should not invalidate such statutes under the equal protection clause simply because the legislature decided not to correct "all evils at the same time."[81]

As construed and applied in *O'Brien,* however, the relevant sections of the New York election laws[82] were hardly remedial in effect; instead they functioned through the state's administrative and judicial bodies to deprive the appellants of their right to vote. When fundamental personal rights are denied by the implementation of state statutes, the policy of judicial deference to remedial legislation is inappropriate,[83] even if that legislation appears harm-

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[79] *Id.* at 535 (Blackmun, J., dissenting). The dissenting Justices followed the attorney general's approach of reviewing the statutes on their face.

[80] Brief for Attorney General at 11; *see* note 11 and accompanying text *supra.* An attorney for Monroe County submitted respondent's brief and delivered oral argument, and his position was essentially identical to that of the attorney general.

[81] Brief for Attorney General at 11 (quoting Semler v. Dental Examiners, 294 U.S. 608, 610 (1935)); *cf.* McDonald v. Board of Elections, 394 U.S. 802, 810-11 (1969). For a summary of the remedial effects of New York's absentee voting legislation, see Brief for Attorney General at 3-5.

[82] N.Y. ELECTION LAW § 117-a (McKinney 1964); *id.* § 153 (McKinney Supp. 1972).

[83] The practice of judicial deference to remedial legislation originated in the economic sphere. *See, e.g.,* AFL v. American Sash & Door Co., 335 U.S. 538 (1949) (state right-to-work law, prohibiting discrimination against nonunion workers but not against union workers, does not violate due process or equal protection); Semler v. Dental Examiners, 294 U.S. 608, 610 (1934) (statute regulating advertising by dentists but not other professionals does not violate equal protection). This concept entered the voting rights field by way of dicta in Katzenbach v. Morgan, 384 U.S. 641, 657 (1966), which upheld § 4(e) of the Voting Rights Act of 1965 (42 U.S.C. § 1973b(e) (1970)) as valid congressional action under the enabling clause of the fourteenth amendment. The facts and question reviewed in *O'Brien* (*see* note 44 and accompanying text *supra*) are clearly distinguishable from those in *Katzenbach.* Likewise, the other voting rights cases which have referred to the remedial legislation principle are also distinguishable from *O'Brien. See* McDonald v. Board of Elections, 394 U.S. 802 (1969) (no showing that detainees were precluded from all means of voting); Fidell v. Board of Elections, 343 F. Supp. 913 (E.D.N.Y.), *aff'd,* 409 U.S. 972 (1972) (state's failure to include

less on its face. Nevertheless, the remedial legislation concept remains a potential obstacle to future litigants when the factual record fails to demonstrate absolute denial of the right to vote to a distinct category or when no express statutory classification is present.

Identification of the precise state action under review also affects the remedy which the state courts must fashion on remand.[84] If only the *statutes* had been reviewed, the Supreme Court's holding would have required invalidation of the core of New York's absentee voting system.[85] Less drastic relief is required to remedy the unconstitutional construction and application of the statutes in *O'Brien,* however, for the state courts, on remand, need only order appropriate absentee voting or "in person" voting procedures for unconvicted detainees and imprisoned misdemeanants.

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temporarily absent voters within absentee voting statute for purpose of primary election held unconstitutional).

Moreover, the fact that the statute under review is remedial in purpose, has apparently never precluded application of a strict standard of review when fundamental rights have been infringed. In fact, when a state selectively confers the right to vote, close judicial scrutiny is required. *Cf.* Rosario v. Rockefeller, 410 U.S. 752, 760 (1973); Kramer v. Union Free School Dist., 395 U.S. 621, 626-27 (1969). The state action in *O'Brien* was analogous to such selective distribution of the right to vote because the state selectively excluded unconvicted detainees and imprisoned misdemeanants from the voting process. Furthermore, the policy of judicial deference to economic regulation is inappropriate where fundamental, personal rights are involved. "Knowledge about civil and individual rights, unlike some economic data, is neither so technical nor so esoteric as to lie beyond the legitimate cognizance of the Court." Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 373 (1949).

Thus, the principle of judicial deference to remedial legislation was inapplicable in *O'Brien* for two reasons: (*1*) *O'Brien* is distinguishable factually and as a matter of law from those voting rights cases in which the principle has been applied, and (2) historically, the principle originally was enunciated in economic regulation cases and is inappropriate in cases dealing with personal civil rights.

[84] Because the Court had jurisdiction under 28 U.S.C. §1257 (1970), disposition of the appeal was governed by 28 U.S.C. § 2106 (1970), which provides:

> The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Id. Thus, although the Court had authority to formulate a decree for entry in state court, it followed the usual practice of remanding for a further proceeding consistent with the Court's opinion. 414 U.S. at 531; *cf.* NAACP v. Alabama *ex. rel.* Flowers, 377 U.S. 288, 310 (1964).

[85] For a list of states having comparable absentee voting statutes, see Jurisdictional Statement for Petitioners, Goosby v. Osser, 409 U.S. 512 (1973).

4. *The State's Justification for Discriminatory Action*

The general outline for judicial examination of a state's justification for its discriminatory action under the compelling state interest test had become fairly well settled prior to *O'Brien.* Two inquiries were required: (*1*) whether the state's objectives were legitimate,[86] and (2) whether the state's means were reasonably necessary for the achievement of those objectives.[87] Most equal protection claims have hinged upon the application of these general principles. Not only did Chief Justice Burger ignore these tests in *O'Brien,* he did not even consider what justification the state might have had for its action in barring unconvicted detainees and imprisoned misdemeanants from the right to vote. In this respect the new standard, though extremely vague, is more stringent than the rational relation test in which even hypothetical state interests were sufficient justification for discriminatory classifications.[88] Absent a strikingly arbitrary discrimination between classes, such as the "confined in the county of residence" distinction, the Court may have to assess the state's justifications for its action to determine if it was arbitrary even under the Chief Justice's approach.

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[86] Dunn v. Blumstein, 405 U.S. 330, 351 (1972); Bullock v. Carter, 405 U.S. 134 (1972).

[87] Various formulations of this test have been applied. *See, e.g.,* Kusper v. Pontikes, 414 U.S. 51, 61 (1973) ("less drastic means"); Dunn v. Blumstein, 405 U.S. 330, 353 (1972) ("least restrictive means necessary"); Bullock v. Carter, 405 U.S. 134, 144 (1972) (means "reasonably necessary to the accomplishment of legitimate state objectives").

The appellants suggested a three-pronged test:

> (1) the state's goals must be of compelling importance; (2) its means must be closely related to those goals and may not unnecessarily burden or restrict the fundamental right; and (3) the state's claim must involve an element of necessity, not mere speculation about possible evils to which the classifications may be related.

Brief for Appellants at 13. It is difficult, however, to perceive the distinction between the requirements of "compelling importance," "element of necessity," and no "unnecessary burden."

[88] *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). The Attorney General of New York maintained that the traditional standard of reasonableness and rational relationship applied to remedial, absentee voting legislation. Brief for Attorney General at 8-9. Thus, his brief offered the Court little assistance in identifying the state's actual objectives and the appropriateness of the means used to attain those objectives.

Furthermore, analysis by the Court of the state's interests is difficult for at least two reasons. First, the purposes of state legislative or administrative action are seldom documented or subject to proof by ordinary judicial techniques. The Justices must rely on their own, and counsel's, logic and conjecture to identify the state's interests. Second, assuming the state's interests can be identified, the Court must weigh and balance those interests against competing private rights. Because of the precedential impact of constitutional decisions, that balance usually involves more than the limited facts of the case under review.

The precedents establish that the states have legitimate interests in assuring intelligent voting[89] and in preserving the integrity of the election process.[90] No contention that unconvicted detainees or imprisoned misdemeanants are less knowledgeable than other qualified voters was, or could be, offered in *O'Brien.* The only possible justification for excluding the prisoners from voting, therefore, lay in the state's interest in the integrity of the election.

Undoubtedly, preventing electoral fraud and limiting disruption of orderly electoral procedures are the predominant legislative purposes in requiring systematic "in person" voting and selective distribution of absentee voting privileges.[91] However, exclusion of unconvicted detainees and imprisoned misdemeanants from absentee voting procedures or other alternative procedures is not necessary to guard against these dangers. There is no indication that detainees or misdemeanants are more likely to engage in election fraud than other qualified voters.[92] The hypothetical danger "that without the protection of the voting booth, local officials might be tempted to try to influence the local vote of in-county inmates" was soundly rejected by the concurring Justices in *O'Brien.*[93] Moreover, there is evidence that the distribution of absentee ballots to prisoners, the furnishing of paper ballots in prison, and the use of mobile

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[89] *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 360 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

[90] *See, e.g.,* Rosario v. Rockefeller, 410 U.S. 752, 761-62 (1973).

[91] *See* Note, *supra* note 48, at 650-51.

[92] New York has disqualified only convicted felons from exercising the franchise. N.Y. ELECTION LAW § 152(2) (McKinney Supp. 1974). Penal confinement deprives a prisoner of no rights, including the guarantees of the fourteenth amendment, which are not "expressly, or by necessary implication, taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945); *see* Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam,* 390 U.S. 333 (1968) (racial segregation in jail unconstitutional). *See also* Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied,* 409 U.S. 885 (1972) (right to receive and transmit mail). In the case of unconvicted detainees, it is clear that confinement serves only to assure the presence of the accused at trial. *See* Jones v. Wittenberg, 323 F. Supp. 93, 100 *aff'd on rehearing on another issue,* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). *See also* Brenneman v. Madigan, 343 F. Supp. 128, 138-40 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971). *See generally* authorities cited note 8 *supra.*

[93] It is hard to conceive how the State can possibly justify denying any person his right to vote on the ground that his vote might afford a state official the opportunity to abuse his position of authority. If New York truly has so little confidence in the integrity of its state officers, the time has come for the State to adopt stringent measures to prevent official misconduct, not to further penalize its citizens by depriving them of their right to vote. There are surely less burdensome means to protect inmate voters against attempts to influence their votes . . . .

414 U.S. at 534 (Marshall, J., concurring).

registration units do not unduly burden or disrupt the electoral process.[94] Any mere administrative inconvenience in implementing such programs is insufficient to justify the absolute denial of the right of prisoners to vote.[95]

CONCLUSION

When a majority of a court cannot agree on the rationale for a decision, the significance of that decision is difficult to gauge. The sharp split of opinion in *O'Brien v. Skinner* presents this problem. A few points are clear, however. The Burger Court has retreated from the sweeping equal protection analysis of the Warren Court precedents in the voting rights field.[96] Characterization of the right to vote as a fundamental interest, constitutionally protected by the fourteenth amendment, has been abandoned. The compelling state interest standard for close judicial scrutiny of state election laws which limit access to voting apparently has been replaced with a more flexible but undefined standard of "arbitrariness."

Ironically, the present Court jettisoned the prior mode of analysis while upholding the right of unconvicted detainees and imprisoned misdemeanants to vote by absentee or other special

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[94] The New York Court of Appeals rejected specialized voting procedures for the penally confined because of "attendant difficulties" and "like hazards" but did not identify these difficulties. *See* note 15 *supra.*

At least three factors support the conclusion that the state could distribute absentee ballots or develop alternative voting procedures for appellants without unduly disrupting the electoral process or increasing the risk of electoral fraud. First, "branch" or "mobile registration" units are used extensively and manned by volunteers for nonprison voters in New York. *See* Bishop v. Lomenzo, 350 F. Supp. 576 (E.D.N.Y. 1972). Second, at least some prison personnel are prepared and willing to assist in providing special "in prison" voting procedures. *See* Brief for Appellants at 6 n.7 (Monroe County Sheriff's desire to cooperate noted). Third, New York election officials already maintain staffs and procedures to process absentee balloting forms for two classes of persons: (*1*) qualified voters and their spouses, parents, and children who are unavoidably absent from the county of their residence because of duties, business, occupation, vacation, or confinement in a veteran's hospital (N.Y. ELECTION LAW § 117 (McKinney Supp. 1974)); and (2) qualified voters unable to vote in person because of illness or physical disability (*id.* § 117-a). *See* Love v. Hughes, Civil No. 72-1081 (N.D. Ohio, filed Oct. 27, 1972) (distribution of paper ballots to pretrial detainees).

[95] *See* Carrington v. Rash, 380 U.S. 89, 96 (1965).

[96] Clearly, Justices Blackmun and Rehnquist, dissenting in *O'Brien,* oppose the "compelling state interest" approach. Chief Justice Burger and Justice Stewart have also expressed disapproval of this standard of review. *See* Kramer v. Union Free School Dist., 395 U.S. 621, 634-41 (1969) (Stewart, J., dissenting); notes 27-28 and accompanying text *supra.* Justice White has never articulated a preference but appears to follow Chief Justice Burger's approach. Despite his dissent in *Rosario v. Rockefeller,* Justice Powell apparently followed Chief Justice Burger and the *Rosario* rationale in *O'Brien.* Only Justices Brennan, Douglas, and Marshall clearly continue to support the Warren Court's approach.

procedures. To do so, Chief Justice Burger based the Court's decision on an extremely narrow ground—the minor, and probably fictitious, difference in treatment between those prisoners confined within and those confined without the county of their residence.[97] The factual pattern in *O'Brien* also provides a basis for distinguishing its holding in future cases. The state had absolutely barred the prisoners from voting; their deprivation could not reasonably be attributed to their own action. Furthermore, the challenged state action involved more than a legislative determination; administrative and judicial refusals of alternative voting procedures added strength to the prisoners' claim.

Thus, although the precise holding of *O'Brien* will probably have little direct impact on future voting rights cases, the case is significant as an indication of a major shift in the Court's position on equal protection challenges to electoral laws that limit access to the ballot. In the future, an individual or group may have to prove more than denial of the right to vote in a single election in order to invalidate state-imposed infringement of voting rights.

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[97] This narrow distinction precludes viewing *O'Brien* as a case removing the inequities of imprisonment generally. *Cf.* note 8 *supra.*